

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 241 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HAMIR RAM

Versus

VARISNG RAIMAL

Appearance:

MR DU SHAH for Petitioners

MR JITENDRA M PATEL for Respondent No. 1

SERVED for Respondent No. 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 6/02/98

J U D G E M E N T

1. This is plaintiffs' Second Appeal arising out of the following facts :

The plaintiffs - appellants filed a Suit for declaration that they had got a right of way to their plots Survey Nos. 511 and 512 through southern portion

of Survey Nos.502 and 510, in the alternative through southern portion of Survey Nos.502 and 506, further in the alternative through Survey Nos.517/1 and 515 of respondents No.4 & 5. The right of passage was claimed on several grounds. The first was by way of immemorial user, by acquisition as prescription, as grant and as easement of necessity. They also sought injunction restraining the owners of the above plot numbers from preventing them from passing through the aforesaid passage and for taking carts, bullocks and ploughs, etc. The claim of the plaintiffs was that plot Nos.511 and 512 belonging to them are in land locked condition. Plot Nos.502 and 510 are to the west of the plaintiffs' plots owned by respondents No.1 & 2, whereas plot Nos.503, 508 and 509 are in the ownership of respondent No.3, whereas plot Nos. 515 and 517/1 are owned by respondents No.4 & 5. Some dispute arose in respect of this right of passage when Suit No.95 of 1971 was filed, but it was dismissed. The Appeal was preferred where the Suit was withdrawn with liberty to file a fresh Suit. Before that the appellant No.2 initiated proceeding in the Court of Mamlatdar in 1966 for right of way to the north of Survey Nos.502 and 509 of south of Survey Nos.503 and 508. The Suits were dismissed by Mamlatdar observing that the party should go to Civil Court. Thereafter a compromise was entered into between the parties as a result of which respondents 1 to 3 or their predecessors agreed to keep open a space to the south of Survey Nos.502 and 510 for the purposes of their passage. Subsequent to this oral compromise an agreement in writing was entered into wherein the right of way from southern portion of Survey Nos.502 and 510 was recognised. In the alternative it was pleaded that the plaintiffs have right of passage from northern part of Survey Nos.502 and 509. The right of passage through plot Nos.517/1 and 515 belonging to respondents No.4 & 5 was referred to as Vandhavav way.

2. The Suit was contested by the defendants on various grounds, viz. the Suit was barred by limitation and that the plaintiffs have not acquired any easement by immemorial user or prescription or by way of necessity. The written agreement is said to be inadmissible in evidence because through it immovable property for more than Rs.100/- was transferred. Hence, it is compulsorily required to be registered under Section 17(1) of the Registration Act.

3. Respondents No.4 & 5, however, in their Written Statement admitted that the appellants have got northern as well as southern way, but they are not the ways passing through their fields. They denied that the

appellants have got a right of way through Survey Nos.517/1 and 515 belonging to them.

4. The trial Court found that the Suit was barred by limitation. It further found that the plaintiffs failed in establishing acquisition of prescriptive right of way or right of way by immemorial user or grant or as the easement of necessity. The trial Court further found that the plaintiffs failed to establish their alleged claim of right of way through Vandhavav way. The suit was ultimately dismissed.

5. An Appeal was preferred in which the lower Appellate Court found that the Suit was not barred by limitation. It, however, found that the appellants' claim of easement by prescription, by necessity or by immemorial user was not established and the right of northern way called as Vandhavav way was also not established. The plaintiffs claim of passage on the strength of grant was also not accepted. Hence the Appeal was dismissed.

6. As many as six substantial questions of law were formulated. These substantial questions are overlapping in nature. In nutshell the main question for consideration in this Appeal is about the nature of document marked 3/3. It is to be seen whether it was an acknowledgement of right of way which was granted earlier or it is a document transferring immovable property worth more than one hundred rupees or it is a document transferring easementary right or it is a document which requires compulsorily registration. Another question would be whether the question of consideration for executing the document could be looked into from oral evidence in variance with written document and the last is the question of estoppel.

7. The last question formulated is principle of promissory estoppel. This principle is applicable to administrative law and not between the private parties.

8. So in effect the main question for consideration is nature of document 3/3. English translation of this document has been filed inasmuch as the original is in Gujarati. In short the recital in this agreement is that some dispute arose about the right of passage between plaintiff No.2 and defendnt Nos. 1 & 3. In order to resolve that dispute these three persons met and entered into oral agreement, the terms of which are contained in this document. From this document it appears that the Agreement was entered into earlier and the document 3/3

was reduced into writing subsequently. The oral evidence clarifies this position and it is to the effect that this Agreement was reduced into writing three days after previous oral agreement, according to which land 8 ft. wide from north to south on the southern shedha of both survey numbers is to be permanently kept reserved for the use of us for right of way and none of us shall obstruct the right of way of others.

9. The second para of the document recites the proper consideration received at the time of oral agreement by the owners of Survey Nos.502 and 510 in respect of reservation of 8 ft. wide land. The word "consideration" is ambiguous. The amount of consideration in cash is not mentioned in the agreement which has been supplemented by oral evidence. The oral evidence in these circumstances is not hit by the provision of Sections 91 and 92 of the Evidence Act. The consideration for this grant was that plaintiff No.2 had to give cash, viz. Rs.351/- as has come in evidence and was further to give his land out of plot No.508 in the east of plot of defendant No.3 so that it merges with Survey No.508 belonging to defendant Meraman Arjan, who has given land out of his survey No.510. It is further recited in this para that plaintiff No.2 has given this land at the time of oral agreement. The next para inter-alia recites that the way so demarcated shall be used by the parties. Next para shows that if any party acts contrary to this agreement and goes to Court then the party committing breach of agreement shall be liable to damages and cost.

It is again reiterated in the next para that the aforesaid oral agreement regarding right of way is already agreed upon earlier. The agreement in that regard is written today.

10. Mis-interpretation or misconstruction of document on which claim of a party is based amounts to substantial question of law and such error can be corrected in Second Appeal as was held by the Apex Court in the case of Bhusawal Borough Municipality V/s. Amalgamated Electricity Co.Ltd. Bhusawal & anr., reported in 1966 SC 1652

11. It is manifestly clear from the recital in this document that oral agreement was entered into earlier and this writing came into existence subsequently. Therefore, to say that this is actual agreement through which easement was created is nothing but erroneous interpretation of the document which can be corrected by the High Court in Second Appeal. From what has been

extracted from different portion in the agreement no doubt is left that oral agreement or compromise or the settlement or for that matter grant took place earlier and this earlier period is supplemented by oral evidence, viz. three days before execution of this document. The document therefore records the terms of the oral compromise entered into earlier between plaintiff No.2 and defendants No.1 & 3. It is, therefore, incorrect to hold that this is a Sale Deed through which easement was created or transferred.

12. While interpreting the document not only the contents have to be kept in mind, but the real intention of the parties is also to be determined. The form in which the document is styled is inconclusive for determination of intention of the parties. In this document it is nowhere mentioned that it was a sale Deed. The intention of the parties from oral evidence is also not coming out that it was a sale of immovable property. Easement by way of passage no doubt creates some interest in the property, but not title or ownership in the property. The dominant owner can not, while claiming easement of passage, say that he has acquired title or ownership in the servient tenement.

13. Section 6(c) of the Transfer of Property Act provides that easement cannot be transferred apart from the dominant heritage. It is thus clear from this section that easement can be transferred when dominant heritage is also transferred. If there is no transfer of dominant heritage mere easement can not be transferred.

14. The sale is defined under Section 54 of the Transfer of Property Act which says that sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such a transfer in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. The sale of immovable property of value less than hundred rupees can be effected either by registered instrument or by delivery of the property.

15. It is thus obvious from Section 54 that there is no sale unless transfer of ownership in exchange for a price paid or promised to be paid or partly paid or partly promised to be paid takes place.

16. In the case in hand there has been no transfer of ownership in property over which the right of passage is denied. Much stress was laid on the fact that

thetransfer was evidenced for an amount of Rs.351/-. Hence it requires registration. Reference was also made by the learned Counsel for the respondent that under section 2(6) of the Registration the right of way is included in the definition of immovable property. Section 2(6) of theRegistration Act reads as under :

"Immovable property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

It is thus clear that right of way is immovable property within the aforesaid definition.

17. It is now to be seen whether under Section 17 of the Registration Act the transfer of such property requires registration or not. Section 17(b) of the Registration Act inter-alia provides that a document other than non-testamentary instruments which purport or operate to create declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property is required to be registered.

18. Thus according to this section if a document purports or operate to create, declare,assign or extinguish any right title or interest in immovable property having value more than hundred rupees it is required to be registered.

19. The question is whether the document creates, declares,assigns or extinguishes the right of easement or not. From the recital in the Agreement itself it is clear that the easement was created orally three days before this document was brought in existence. Consequently this document by itself does not create or declare any easement. As such it hardly requires registration.

20. The Madras High Court in the case of Ramkrishna Doss Chandrathna Doss V/s. P Kesawala Chetty and others, reported in 1927 Mad. 1145 held whether a document dealing with immovable property acquires registration or not, depends on whether the document in question constitutes the bargain between the parties or it is merely the record of an already completed transaction.

The Privy Council in Subramanian V/s. Lutchman, reported in A.I.R. 1923 PC 50 also observed that the test in such cases is was the document in question bargain between the parties.

In V.Krishnaya V/s. Poonuswami Iyer, reported in AIR 1924 Mad, 547, the document was subject matter of interpretation and considering the document it held that if the document constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you can not give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidences the document, and if it is a mortgage document, he would be precluded from so doing by the Transfer of Property Act and under the Registration Act.

21. I have already held in foregoing portion that from the document and oral evidence on record it is clear that compromise was entered three days before the document came into existence. Hence the nature of this document is nothing, but recording the Memorandum of earlier Agreement or compromise and such Memorandum of Agreement does not require registration.

22. In Musunoori Satyanarayana Murli V/s. Chekka Laxshamayya, reported in A.I.R. 1929 Mad, 79, it was laid down that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by Section 54. There is nothing in law which necessitate the creation of an easement being evidenced by registered document. It further held that for that the provisions of Act have no application to creation of easement and the act was not intended to deal with them. Regarding Section 6(c) of Transfer of Property Act it was held by the Madras High Court that Section 6(c) together with Section 54 contemplates transfer of existing easement and not creation of easement.

23. Thus from this Authority it is clear that transfer of easement without reference to transfer of immovable property is meaningless and mere creation of easement does not require compulsory registration of such a document.

In any view of the matter from the disputed document it cannot be said that it is a case of transfer of easement.

24. Easement by grant may be created by oral agreement. It may be gratuitous. It may also be for consideration. If the grant was for consideration it hardly requires registration because mere creation of easement is not compulsorily registrable. Thus, even if Rs.351/- were paid as consideration or that some portion of the plot of the plaintiff was given to the defendant No.3 it does not render the document a Sale Deed. Further, the recital in the said Deed that all the parties to the Agreement were to use the right of passage without obstruction from any of them will indicate that the parties never intended to transfer ownership in respect of the land which was set apart for the purpose of common passage. Hence, it cannot be held to be a sale deed of immovable property having value more than one hundred rupees. For this reason also the Agreement does not require registration.

25. From what has been discussed above it is apparent that the lower Appellate Court fell in error in holding that the document in question is Sale Deed of immovable property whose value exceeds one hundred rupees and it requires registration. On the other hand the document can be read in evidence and if it is read in evidence the grant of easement under oral agreement, whose terms are evidenced in this document, will entitle the plaintiffs to claim their right of way.

26. The finding of the lower Appellate Court on other aspect of the case that the plaintiffs have failed to establish prescriptive easement or easement of necessity or easement by immemorial user is a finding of fact based on proper appreciation of evidence on record which requires no interference in this Second Appeal. The two Courts below on the basis of evidence on record returned concurrent finding of fact on the aforesaid points. Likewise regarding Vandhavav way already there is concurrent finding of fact of the two courts below which requires no interference in this Appeal.

27. Thus, since the plaintiffs have established right to passage by oral grant they are entitled for the reliefs sought for. The two Courts below were therefore in error in dismissing the Suit. The Appeal therefore succeeds and is allowed with cost through out. The Judgment and Decrees of the two Courts below are hereby set aside.

the Suit of the plaintiff appellant is decreed.
It is hereby declared that the plaintiffs have right of passage through southern portion of Survey Plot Nos.502 and 510 to the extent of 8 ft. wide land running from

north to south on the southern shedha of both Survey numbers. The defendants are permanently restrained from interfering with the plaintiffs' user of the aforesaid passage.

* * * * *

sas